法学家

THE JURIST

6
2020

国家社科基金资助期刊

法学家

2020年第6期（总第183期）　　2020年11月出版

主题研讨：《民法典》制度规定的适用及其完善

专　论

视　点

◎ 建设中国特色法治体系研究 ◎

评　注

ABSTRACTS

There are three legislative ideas on the right to use space for construction purposes: "the space superficies—sub-superficies mode", "general space superficies-distinguishing superficies mode" and "space use rights stratification mode". Based on China's public ownership of land, the Property Law of 2007 selected the "space use rights stratification mode". The key to this model is to determine the "vertical boundary" of the use rights of various types of land(surface, above-ground space, underground space) . However, due to the lack of practical operational schemes and the fact that the demand for three-dimensional development land is not strong, the efforts to "predetermine" the vertical boundaries of construction land use rights in both theoretical and realistic aspects have all failed. The formulation of the Property Rights in Civil Law is just around the corner, and in light of China's national conditions, we shall still adhere to the idea of "the stratification mode of the use right of construction land". At the same time, taking the "acceptance system for construction land" in the practice of land management as a reference, we shall transform our thinking in to implementing the system of the stratification mode of the use rights of construction land in Property Law, by "post confirming" the vertical boundaries of the rights to use construction land.

Key Words Use Rights of Land Space; Establishment of the Stratification Mode of the Use Rights of Construction Land; Vertical Boundaries of Land Space; Acceptance System for Construction Land

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In the development of atypical guarantees, the effectiveness of the guarantees and the function of the guarantees are separated. The realization of its function depends on the guarantee contract. Taking the atypical guarantee "trading-based guarantee" as an example, which is popular in practice in China, the agreement between the parties should be determined the nature firstly. This ist also the premise of the application of Article 24 of the Judicial Interpretation of Private Lending. The determination of the nature of contract requires a comprehensive consideration of the contractual agreement, to make clear the rights of the partners and the independence of trading-based guarantee. From the lesson of the rise and fall of the right of the pre-determined guarantee in the Japanese law, the party's autonomy should be maintained as much as possible.

Key Words Atypical Guarantees; Trading-based Guarantee; Flexible System; Nature of Guarantee Contract; Purpose of Guarantee

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The rule of the "Three—Rights separation" of rural land means that the realization of the specific mode

of rural land transfer must be divided into rural land management rights. If there is no right division, there will be no rural land management right. Its essence is to overcome the legal obstacles of farmland circulation through the innovation of legal and technical tools. Legislation serves the practical needs of rural land transfer, and intentionally dilutes the nature of Rural land management right. In the interpretation, it is necessary to consider both the transfer period and the transfer mode to make it clear. The key and core of understanding the land management right is to clarify its formation mechanism, which needs to be grasped in the unity of opposites between land circulation and right separation. In the context of "Three—Rights separation" of rural land, the word "circulation" in legislation has a specific legal meaning. The so-called "circulation land management right" under the situation of the need for the separation of rights should be interpreted as the formation of the Rural land management right; the so-called "circulation land management right" and "the re circulation land management right" under the situation of no need of the right separation as the circulation of rural land management right, so as to realize the standardization and unification of the legal meaning of the word circulation. The legal structure should be unified on the basis of systematic interpretation, and eliminate the difficulties of understanding and application caused by the diversity of land management rights and its existing forms.

Key Words Civil Code; Separation of Three Powers; Land Management Right; Formation Mechanism; System Structure

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Application of Restitution Rules in the Event of Nullity of A Contract *TENG Jiayi · 40 ·*

If a contract which includes a payment is null, the rule of Article 157 of the Civil Code of PRC "restitution of property" can be the relief of real right, or the relief of obligation. In particular, when the contract is aimed at the transfer of ownership, and its public notice is not completed, the claim for recovery shall be established, on the contrary, the claim for unjust enrichment shall be established. Recognizing or not the theory of Act of real right does not affect the application of the rules mentioned. Under conditions of nullity, the difference of contract type is decisive to the determination of the claim of restitution. The right of claims derives from property law or unjust enrichment law, or contract law, therefore, the Article 157 cannot be used as the basis of the independent claim. In terms of forms of restitution, the restitution in kind is the principle and restitution in value is the supplement, but the parties may make a special agreement on the form. The Contract Part of Civil Code realizes the renewal and expansion of unjust enrichment law. From the perspective of interpretation, the scope of restitution for the recipient includes the extant enrichments and the fruits, meanwhile, its subjective state should be considered. If malicious, he should return the fruits that should have been collected but not collected.

Key Words Nullity; Unjust Enrichment; Recovery; Restitution in Value; Contract Part of Civil Code

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An Empirical Study on Sentencing Practice of Suspended Death Penalty with Limited Reduce by Homicide *WANG Fuchun · 54 ·*

Empirical study shows that contemporary setencing practice of suspended death penalty with limited reduce is neither addition process based on death penalty nor subtraction process based on suspended death

penalty. Whether making a limited reduce to the defendant or not depends on both preventitive-and retributive circumstances. The implication of TSSAS can be used for examing the real affacting of multiple circumstances in cases. The setencing practice of suspended death penalty with limited reduce by Homicide in China maintains basic balance between crime and penalty. The suspended death penalty with limited reduce indeed makes it harder than suspended death penalty, meanwhile it also makes it lighter than death penalty. The guidance effact of criminal guidance case number 4 and number 12 should be supplemented by more cases. The article also analysises key circumstances and large sample cases, moreover, it suggests setencing rules of suspended death penalty with limited reduce by three types of homicide.

Key Words Suspended Death Penalty with Limited Reduce; Threatical Quantity of Sentencing; Criminal Guidance Cases; Definition by Criminal Circumstances

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Empirical Test on the Standardization Level of Sentencing: An Analysis of Intentional Injury Cases *WANG Yue · 69 ·*

The statistical analysis of 303, 256 judgment documents of intentional injury shows that the judgment of fixed-term imprisonment for intentional injury is highly standardized. In practice, the judge's sentencing method follows the theoretical core of the "three-step" method. The determination of the starting point of sentencing and the benchmark penalty is highly consistent with the norms, merely the application of only a few circumstances conflicts with the norms. The rigorous normative system, the need for judges to avoid decision risk, and the two-way conformity of practice with norms provides the prerequisite, motivation, and realization path for the highly standardized sentencing. However, under the premise that norms may not be correct, highly standardized sentencing may instead lead to the repetition of errors and atrophy of experience. Based on the current high level of standardization, the next stage of sentencing reform should timely turn from formally legal standardization to substantially legitimate standardization by establishing a sentencing legitimacy evaluation system, from mechanical standardization to initiative standardization by defining, maintaining and strengthening a dual rule system constructed by both sentencing norms and experience.

Key Words Standardization of Sentencing; Influence Factors of Sentencing; Legitimacy Evaluation System; Dual Rule System

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Logic of the Theory of Domination by Virtue of An Organization in Criminal Law and Its Introspection *YUAN Guohe · 84 ·*

In light of the theory of domination by virtue of an organization, ringleaders of a criminal organization should be perpetrators, if i) the organization has a hierarchical structure, ii) it detaches itself from the law in the area of its criminally relevant activities, and iii) executors are fungible. However, the fungibility of the direct executor is solely a consequence of the existence of numerous available instigated people, which does not only exist in a criminal organization. Ringleaders could almost be certain that a constituent act would be carried out by someone, but that is only because of the accumulation of probabilities brought by numerous available instigated people. The dominance over the realization of specific constituent elements should not be affirmed based on an overall inspection. The theory of domination by virtue of an organization does not demon-

strate how the ringleaders achieve their control over the will, and judges domination without specific constituent elements, which actually results in the domination of the constituent result instead of control over the constituent act. Behaviors of any person without flaws in will should be deemed as totally free, so that he cannot be "used" as an act tool. Nevertheless, in accordance with the theory of domination by virtue of an organization, a perpetrator behind a totally free direct perpetrator can also be admitted, which is contrary to the principle of autonomy. Even if ringleaders are recognized as instigators, they would not be lightly punished.

Key Words Domination by Virtue of an Organization; Fungibility; Control over the Constituent Act; Principle of Autonomy; Instigator

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The Previous Life and This Life of the Centrality of Trials and the Dossiers

As the double pillars of Centrality of trials, the confrontation clause and the hearsay rule prevailed in the middle ages as a result of the blood sin and continued in England common felony trials. It required a capital sentence be based on the justices' public conscience acquired in the court instead of his private conscience out of the court or the dossiers regardless of its reality, and its aim was to protect the justices from the fatal sin. Comparatively, the dossiers, functioning as fact-finding, fact-fixing and fact-reproducing, prevailed in Europe common felony trials and in England high treason trials in 16-17th century when the state security overcame the blood sin. However, since the middle of 17th century when the human rights rose and the state security fell, the centrality of trials returned to England high treason trials and functioned as concealing the truth and preserving the rule of law. If the criminal justice is aimed at fact-finding, the dossiers with the self-knowing information in them will win and the centrality of trials loses, for the latter's only function is restricted to singling out few police-framing information by Cross-examination in public courts. China has no centrality of trials tradition in its culture and its criminal justice has been aiming at fact-finding, as a result, the dossier-centered model is inevitable. In order to activate the reform of Centrality of trials in China criminal justice, it's necessary to abandon the fact-finding and rebuild the function of the reform.

Key Words Centrality of Trials; Dossier; Self-knowing Confession; Confession by Police-framing

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On the Diffraction Effect of Grassroots Law Enforcement:
From the Perspective of Ecology

The generalization of effects is a common empirical phenomenon in grass-roots law enforcement. The generalization of law enforcement effects is a social fact, produced in the interaction of different social systems. Therefore, it is methodologically appropriate to grasp this phenomenon from an ecological perspective. The practical form of law enforcement effect can be summarized and analyzed by the term "grassroots law enforcement diffraction effect". As an analytical framework, the diffraction effect of law enforcement at the grassroots level includes four aspects: the clarity of norm generation, the smoothness of norm transmission and implementation, the openness of sectional organization and social boundaries, and the interactive effectiveness of law enforcement. This allows us to systematically grasp the entire process of law enforcement operations. Dissipation of law transmission, convergence of law enforcement organizations, uneven distribution of

attention among law enforcement entities, overlapping of administrative power, and grassroots interest differentiation are the main reasons for the significant diffraction effect of law enforcement. In order to suppress the diffraction effect, it is necessary to standardize law enforcement behavior, but it is also necessary to focus on the structure and system of law enforcement, to optimize the legal transmission, organizational structure and law enforcement interaction, so as to achieve a balance between the law enforcement system and the law enforcement environment.

Key Words Generalization of Law Enforcement Effects; Diffraction Effect of Grassroots Law Enforcement; Law Enforcement System; Ecology; Social Governance

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Principle and Operation of Efficiency-Oriented Comprehensive Law Enforcement Reform *LIU Guoqian · 132 ·*

"How to carry out effective comprehensive" is a difficult problem haunting the comprehensive law enforcement reform. Combination is merely an external result of comprehensive law enforcement reform, but the reconstruction of division of labor is its actual consequence. Improving the effectiveness of law enforcement is the core demand of the reform. In the efficiency-oriented comprehensive law enforcement, it is essential to deal with the two basic problems of function optimization and coordination of power operation. The function optimization includes the scientific division of matters under the comprehensive scope and the scientific cutting of the process of administrative power. The former adopts the "high demand-easy supply" standard of restricting comprehensive law enforcement in integrated areas or specific areas. While the cutting of the latter mainly follows nature of specific administrative power. Aiming at the inevitable division of labor, we should establish procedural synergy mechanism and structural synergy promotion mechanism for management decision-making and comprehensive law enforcement. The former contains the procedural arrangements for the overall considerations, joint action and information sharing; The latter indicates the organizational arrangements based on territorial management, including different degrees of constraints and bond, as well as the determination of superior supervisors or guiding departments that play a supervisory role in territorial synergy.

Key Words Comprehensive Law Enforcement Reform; Administrative Efficiency; Division of Labor; Optimization; Synergy

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On the Concept of Monopoly Agreement Again *LIU Jifeng · 147 ·*

Since the implementation of the Anti-Monopoly Law, the handling of vertical price monopoly agreement cases has become more and more evident in the binary opposition between judiciary and administrative regulations. The retrial ruling in the Case of Yutai Corporation tried to coordinate and bridge the divergences in understanding, but the interpretation in the ruling still failed to indicate a clear identification route and establish a relatively consistent identification model for the handling of vertical price monopoly agreement cases. In fact, the issue of vertical price monopoly agreement is a systemic issue, and it involves the entire monopoly agreement system. The source of the problem lies in the incomplete information of the concept connotation of the monopoly agreement and the improper method of dividing the concept extension, which leads to the dislocation of the principle application. Moreover, the implement of the monopoly agreement system should start with the perfection of the concept. Determine the defined items and their connotations at first, and then on

this basis adopt the "trichotomy" of concept extension to correspond respectively to the per se rule, the reason rule, and the per se legality rule.

Key Words Monopoly Agreement; Trichotomy; Dislocation of the Principle; Institutional Reconstruction

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The Defect of Corroboration Method and Its Remedy: the Diverse Evidence Analysis Method As the Direction *ZONG Bo · 160 ·*

The corroboration method is the only basic method of evidence analysis in China's criminal proof. However, there are some defects in corroboration method, and it will produce formalization of litigation proof, hollowness of proof standard and rigescent fact identification. Therefore, it is necessary to introduce other evidence analysis method. The story method and argumentation method in Western evidence theory are two kinds of evidence analysis methods that are worth learning. The corroboration method, story method and demonstration method do not have compatibility problems. Therefore, we can integrate the whole perspective test of story method, the single evidence test of argumentation method and the corroboration test of information of corroboration method to build a rigorous and flexible diverse evidence analysis method system. Specifically, the diverse evidence analysis method system includes the construction of the story and the single evidence reasoning chain, the support test of the evidence to the story, the corroboration review of the evidence and the story plot, and the test of the story plot and the entirety with experience generalization.

Key Words Evidence Analysis Method; Corroboration Method; Experience Generalization; Evidential Reasoning

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Comments on Article 192 and Article 193 of the Civil Code (The Effect of Expiration of Extinctive Prescription and Prohibition Rules of Authority) *YANG Wei · 176 ·*

Article 192 of the Civil Code is the general rule the effect of expiration of extinctive prescription, and article 193 is the prohibition rules of authority. The occasion, subject, form and effect of invoking the right to defense of extinctive prescription should be determined under the framework of "doctrine of right of defense", the invoking behavior is also restricted by the principle of good faith. If the obligor agrees to perform after the expiration of the limitation period, it constitutes an act of waiving the right to defense of extinctive prescription in an express form, the form and effect of the waiver should be determined on this premise. If the obligor has performed the obligations voluntarily after the expiration of the limitation period, it belongs to the performance with legal reasons and does not constitute unjust enrichment, the form and effect of voluntary performance should be determined on this premise.

Key Words Extinctive Prescription; Doctrine of Right of Defense; Prohibition Rules of Authority; Act of invoking; Consent to Performance; Voluntary Performance

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THE JURIST

（双月刊）

2020/6 总第183期

国际标准刊号：ISSN1005-0221
国内统一刊号：CN11-3212/D
定价：40.00元

微信公众号
faxuejiazz

ISSN 1005-0221
9 771005 022205 11>